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Supreme Court, U.S.
FILED

No. _____ 08-213 AUG 15 2008

OFFICE OF THE CLERK
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In The Supreme Court of the United States

JUAN CARLOS LOPEZ,

Petitioner,

v.

ALBERTO GONZALES,
ATTORNEY GENERAL,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The sole issue presented in this case is whether 8 C.F.R. § 245a.19 which governs the interview process for aliens who apply for legalization under 8 U.S.C. 1255a, violates due process under the Fifth Amendment of the United States Constitution. The regulation does not permit an alien to present his legalization application in an adversarial hearing. The alien's only option is to present the legalization application to the district director and file an appeal to the administrative unit. 8 C.F.R. § 245a.2(e).

TABLE OF CONTENTS

Questions Presented i

Table of Contents ii

Table of Authorities iv

Opinions Below 1

Grounds For Jurisdiction 2

Statutory and Regulatory Provisions Involved 3

Statement Of The Case 3

Reasons For Granting The Writ 3

Conclusion 13

Appendix to Petition for Writ of Certiorari:

Appendix A - August 21, 2006, Immigration Judge's oral decision that the Court does not possess jurisdiction to hear the legalization application.

Appendix B - December 11, 2006, The Board of Immigration Appeals affirmed this decision.

Appendix C - September 13, 2007, the Fourth Circuit Court of Appeals denied the Petition for Review.

Appendix D - July 2, 2008, the Fourth Circuit Court of Appeals denied the Petition for Rehearing and Petition for Rehearing *En Banc*.

TABLE OF AUTHORITIES

FEDERAL CASES

Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) 8, 9

Goldberg v. Kelly, 397 U.S. 254 (1970) 11, 12

Landon v. Plasencia, 459 U.S. 21 (1982) 5, 10

Mathews v. Eldrige, 424 U.S. 319 (1976) 9, 10, 12

McNary v. Haitian Refugee Center, Inc., et. al., 498 U.S. 479 (1991) 4,10

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 5

Reno v. Catholic Social Services, Inc., et al, 509 U.S. 43 (1993) 4

Marincas v. Lewis, 92 F.3d 195, 201 (3rd Cir. 1996) 6

Selgeka v. Carroll, 184 F.3d 337 (4th Cir. 1999) 6, 7

Town of Castle Rock v. Gonzales et. al., 545 U.S. 748 (2005) 8

Wilson v. Zeithern, 265 F. Supp. 2d 628 (E.D. Pa 2003) 6

Zadvydas v. Davis, 533 U.S. 678, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001) 6

FEDERAL STATUTES

8 C.F.R. 245.2(a)(1) 12

8 C.F.R. § 245a.19 i

8 C.F.R. 245a.19 3

8 C.F.R. § 245a.19 2

8 C.F.R. § 245a.2(e) i,5

8 U.S.C. 1229a(a)(1) 12

8 U.S.C. 1255a .....*passim*

8 U.S.C. 1255a(a) 9

8 U.S.C. 1255a(c)(1)(A) and (B) 5

8 U.S.C. 1255a(f)(3) 5

8 U.S.C. 1255a(f)(4).....5

8 U.S.C. Section 1252(a)(2)(D).....2

28 U.S.C. Section 1254(1) 3

Fed. R. App. P. 35(b) 3

Petitioner, Juan Lopez, respectfully request that this Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

After Mr. Lopez's application was denied, he was placed in removal proceedings. Mr. Lopez sought to adjust his status under the legalization program. On August 21, 2006, the Immigration Judge rendered an oral decision that the Court does not possess jurisdiction to hear the legalization application. [Appendix A].

The Board of Immigration Appeals affirmed this decision on December 11, 2006. [Appendix B].

Petitioners filed a timely petition for review of the Board's decision. On September 13, 2007, the Fourth Circuit Court of Appeals denied the Petition for Review. [Appendix C].

Petitioners filed a Petition for Rehearing and Rehearing En Banc. That petition was denied on July 2, 2008. [Appendix D].

GROUNDS FOR JURISDICTION

Mr. Lopez filed an application for legalization under 8 U.S.C. 1255a which was denied on March 4, 2006. The application was denied because Mr. Lopez did not respond to requested evidence. According to Mr. Lopez, he never received notice of the additional requested evidence. After Mr. Lopez's legalization application was denied, he was placed in removal proceedings with the issuance of a Notice to Appear on June 22, 2006. J.A. 102-104.

As a form of relief from removal, Mr. Lopez sought to adjust his status under the legalization program. 8 U.S.C. 1255a. Although 8 C.F.R. 245a.19 vests the district director with exclusive jurisdiction over legalization applications, Mr. Lopez argued that the Immigration Judge possesses jurisdiction to adjudicate the legalization application under a straightforward Mathews v. Eldridge analysis. J.A. 81-87. The Immigration Judge held that he does not possess jurisdiction to hear the legalization application. J.A. 22. The Board of Immigration Appeals (BIA) affirmed the Immigration Judge's decision. J.A. 2. Mr. Lopez petitioned the Fourth Circuit to review the BIA Order. In a brief unpublished opinion, the Fourth Circuit denied the petition.

The United States Court of Appeals for the Fourth Circuit took jurisdiction pursuant to 8 U.S.C. Section 1252(a)(2)(D). Under this section, Congress authorized Circuit Courts within the jurisdiction of the Immigration Court to "[r]eview . . . all questions of law and fact, including interpretation and application of constitutional and statutory

provisions, arising from any other action taken or proceeding brought to remove an alien from the United States . . " Id.

The United States Court of Appeals for the Fourth Circuit denied Petitioners' Petition for Review in a decision dated September 13, 2007. Petitioners filed a Petition for Rehearing and Rehearing En Banc on October 15, 2007 pursuant to Fed. R. App. P. 35(b). On July 8, 2008, the Fourth Circuit Court of Appeals denied the Petition for Rehearing and Rehearing En Banc. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This petition for a writ of certiorari challenges the constitutionality of 8 C.F.R. § 245a.19, which governs the interview process for aliens who apply for legalization under 8 U.S.C. § 1255a.

STATEMENT OF THE CASE

Petitioners now seek review by this Court.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED BECAUSE THIS COURT HAS ALREADY FOUND THE LEGALIZATION PROGRAM'S DENIAL PROCESS TO BE INADEQUATE UNDER THE FIFTH AMENDMENT

The legalization program is no stranger to federal litigation and constitutional challenges. Five years after Congress enacted the legalization program, the Supreme Court held that district courts possessed jurisdiction to review administrative appeals of denied legalization applications. McNary v. Haitian Refugee Center, Inc., et. al., 498 U.S. 479, 493 (1991)(holding that district courts possessed jurisdiction to review administrative appeals of denied legalization applications); Reno v. Catholic Social Services, Inc., et al, 509 U.S. 43, 67 (1993)(holding that district courts retained jurisdiction to decide whether any class members were not permitted to file an application for legalization.)

Although judicial intervention was required from almost the inception of the legalization program, no court has addressed the issue of whether aliens in removal proceedings have a Fifth Amendment right to an adversarial hearing.

CERTIORARI SHOULD BE GRANTED BECAUSE THE FOURTH CIRCUIT ERRED WHEN IT DETERMINED THAT IMMIGRATION JUDGES LACKED JURISDITION TO HEAR ADJUSTMENT OF STATUS APPLICATIONS UNDER THE LEGALIZATION PROGRAM

In enacting 8 U.S.C. Section 1255a, Congress set forth a comprehensive scheme to legalize aliens who reside in the United States unlawfully. As part of this comprehensive scheme, Congress said that the legalization application may either be filed with the "Attorney General or with the qualified designated entity, but only if the applicant consents

to forwarding the application to the Attorney General." 8 U.S.C. 1255a(c)(1)(A) and (B). If the legalization application is denied, "The Attorney General shall establish an appellate authority to provide for a single level of administrative appellate review . . " 8 U.S.C. 1255a(f)(3). Finally, an alien may seek judicial review in federal court only if the there is an order of deportation against the alien. 8 U.S.C. 1255a(f)(4).

Although the statute plainly states that the legalization application may be filed with the "Attorney General" and the Immigration Court is a designee of the Attorney General, the former Immigration and Naturalization Service (INS) promulgated regulations divesting the Immigration Court of authority to consider an application for legalization. Under the regulations, an alien may only file a legalization application with the district director or the designated entity. 8 C.F.R. 245a.2(e). Divesting the Immigration Courts of adjudicating legalization of aliens in removal proceedings violates basic principles of due process.

It is black letter law that tribunals must afford litigants a meaningful opportunity to be heard. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); Landon v. Plasencia, 459 U.S. 21, 30 (1982). While aliens who initially seek admission to the United States are not granted constitutional rights regarding their application, "...once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly." Plasencia at 29.

Even if an alien is statutorily classified as inadmissible, they are entitled to due process protections unavailable to those outside the United States borders. See Zadvydas v. Davis, 533 U.S. 678, 693, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001)("once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all "persons" within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent"); Wilson v. Zeithern, 265 F.Supp.2d 628, 633 (E.D. Pa 2003)(the statutory classification of ""inadmissible"...cannot displace due process analysis or perforce place him outside the reach of the Due Process Clause").

Mr. Lopez, who is physically in the United States and has been residing here for over 25 years should be protected by Fifth Amendment's due process clause and therefore must have an opportunity to present his legalization proceeding in an adversarial hearing.

Although the degree of protection may vary, "[w]hen Congress directs an agency to establish a procedure... it can be assumed that Congress intends that procedure to be a fair one." Selgeka v. Carroll 184 F.3d 337, 342 (citing Marincas v. Lewis, 92 F.3d 195, 201 (3rd Cir. 1996)).

In Selgeka, the Court of Appeals for the Fourth Circuit set forth the procedural safeguards available to aliens whose applications are adjudicated by an Immigration Judge versus the lack of process available to aliens who simply have a non adversarial hearing with the district office. First, unlike immigration officers who "[a]re employees of

the INS, immigration judges are independent of the INS." Selgeka v. Carroll, 184 F.3d 337, 345 (4th Cir. 1999).

Second, "unlike the informal, non adversarial interview conducted by an asylum officer, an asylum applicant at an exclusion or deportation hearing is entitled to many procedural rights. The immigration judge must inform the applicant that he has the right to counsel and that free legal services are available." Id. Third, "the applicant is also entitled to an official interpreter if the need arises." Id. Finally, the resulting lack of an evidentiary record hobbles judicial review. In light of the "substantial evidence" standard and "[t]he deficient procedure to which Selgeka was limited", the court found it was "unable to give the BIA decision the searching review it deserves." Selgeka at 345.

The same procedural shortfalls the Court found problematic in Selgeka are present in this case. Under the legalization regulations, the alien is not advised of his rights to an attorney, the United States Citizenship and Immigration Services (USCIS) does not provide the alien with interpreters, and USCIS does not maintain a transcript of the proceedings. This Court is similarly unable to review whether Mr. Lopez received an adequate and fair hearing in the legalization application.

This Court is also unable to review a meaningful record under the deferential substantial evidence standard. "With these process concerns in the forefront, to hold that an asylum applicant is entitled to a fair proceeding before an impartial judge is not a great leap of faith." Selgeka at 345. As

these procedural shortfalls are the same in Mr. Lopez's case, they are equally problematic in this case.

Of course for Mr. Lopez to challenge the legalization regulations, he must have a protected property interest. It is a longstanding canon of constitutional jurisprudence that the "[p]rocedural component of the Due Process Clause does not protect everything that may be described as a 'benefit.' 'To have a property interest in a benefit, a person clearly must have more than an abstract need or desire' and 'more than a unilateral expectation of it. He must instead, have a legitimate claim of entitlement to it.'" Town of Castle Rock v. Gonzales et. al., 545 U.S. 748, 756 (2005), citing Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972).

An entitlement to a benefit may be created by statute. Castle Rock at 756. There are two principal reasons in favor of recognizing a property interest in the legalization application. First, although not all statutory benefits merit due process protection, the withdrawal of a direct benefit -- such as a financial payment or legal right -- may trigger due process protection. See Id at 767-768.

In this case, legalization protects the alien from deportation and provides the opportunity to work legally. McNary v. Haitian Refugee Center, Inc. et al., 498 U.S. 479, 490-491. Mr. Lopez's interest in remaining in the United States and having his legalization application adjudicated by an Immigration Judge is a direct financial and legal benefit.

Second, if the government ultimately has discretion to grant or deny the benefit, the benefit does not give rise to a property interest. Id at 56. Congress divested the Attorney General of discretion to grant or deny an adjustment of status application under the legalization program. 8 U.S.C. 1255a states: "The Attorney General shall adjust the status of an alien to that of an alien lawfully admitted for temporary residency if the alien meets the following requirements. . ."

The "shall" language of 8 U.S.C. 1255a(a) divests the Attorney General from exercising his discretion in granting or denying the case. Thus, Congress created an entitlement to Mr. Lopez to apply for legalization. That entitlement is protected under the Due Process Clause. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970). Therefore, as a property interest is created by the statute, the inquiry is how much process is available to Mr. Lopez. This inquiry is resolved by balancing the factors set forth in Mathews v. Eldrige, 424 U.S. 319 (1976).

CERTIORARI SHOULD BE GRANTED BECAUSE MR. LOPEZ POSSESSES A FIFTH AMENDMENT RIGHT TO AN ADVERSARIAL HEARING PURSUANT TO THE MATHEWS V. ELDRIDGE FACTORS

In Mathews v. Eldridge, this Court set forth three factors that must be weighed in order to determine whether the procedures provided to an individual comport with the Due Process Clause. Mathews v. Eldridge, 424 U.S. 319, 335-336 (1976).

Under Mathews v. Eldridge, this Court must weigh Mr. Lopez's private interest in remaining in the United States, the risk on an erroneous adjudication if Mr. Lopez's case is not heard by an Immigration Judge against the administrative cost to the government to providing Mr. Lopez a hearing with an Immigration Judge. Id. See also Landon v. Plasencia, 459 U.S. 21, 34 (1982), holding that the process available to immigrants is governed by the factors set forth in Mathews v. Eldridge.

In describing the importance of the benefit of legalization, the Supreme Court found that "[t]his status not only protects the alien from deportation; it also creates job opportunities that are not available to an alien whose application is denied. McNary v. Haitian Refugee Center, Inc., et. al., 498 U.S. 479, 493 (1991). In McNary, the plaintiffs alleged and the government did not dispute that legalization was an important benefit. Id. The benefit of legalization is "a measure of freedom to work and to live openly without fear of deportation or arrest..." Id. at 490-491.

The Court found the impact of a denial to obtain gainful employ sufficient to "mandate constitutional fair procedures in the application process." McNary at 490-491. Mr. Lopez's interest in remaining in the United States and being gainfully employed is the same as the those of the McNary petitioners. Indeed, having his legalization application adjudicated by an Immigration Judge is of the highest importance.

Given the importance of Mr. Lopez's interest in remaining in the United States, legalization

application must be decided in an adversarial hearing in front of an Immigration Judge. In an adversarial setting, the procedural shortfalls identified in Selgeka v. Reno would not longer be present. In an adversarial hearing, Mr. Lopez will be able to develop a complete and transcribed record of the proceedings. Mr. Lopez will be advised of his right to counsel and he will be provided with an interpreter. Selgeka at 345. In addition, in an adversarial hearing, Mr. Lopez will be able to cross examine adverse witnesses. In Goldberg v. Kelly, the Supreme Court stated: "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." Goldberg v. Kelly 397 U.S. 254, 269 (1970).

Discussing the importance of an adversarial hearing, the Goldberg v. Kelly Court held:
"Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealously.

We have formalized these protections in the requirements of confrontation and cross-

examination. They have ancient roots. They find expression in the Sixth Amendment. . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in the criminal cases . . . . but also all types of cases where administrative . .. actions were under scrutiny." Goldberg v. Kelly at 270, citing Greene v. McElroy, 360 U.S. 474, 496-497 (1963).

In this case, the legalization application was denied because the USCIS held that Mr. Lopez "abandoned" the application. J.A. 105. According to the USCIS, a request for additional evidence was sent to Mr. Lopez. J.A. 105. It is unclear if that request for additional evidence was ever sent or if Mr. Lopez even received the requested additional evidence. Once in removal proceedings, at a very minimum, due process requires for Mr. Lopez to be afforded to be heard on whether he received the requested evidence and whether he responded to the requested evidence.

Finally, granting Mr. Lopez an adversarial hearing does not create a burden on the government. The Office of the Immigration Judge was already created by statute. 8 U.S.C. 1229a(a)(1). The regulations authorize and the Immigration Judges routinely hear application for adjustment of status. 8 C.F.R. 245.2(a)(1). In fact, Mr. Lopez already appeared in front of an Immigration Judge. J.A. 33-[illegible]. Therefore, the administrative cost of proving Mr. Lopez with an adversarial forum to hear his legalization application is minimal at best.

In sum, a simple weighing of the Mathews v. Eldridge factors must compel this Court to grant

certiorari because the legalization regulations are constitutionally deficient. Mr. Lopez has an important interest in staying in the United States and not being deported. The forum available to Mr. Lopez is deficient at best. He cannot meaningfully present his case for legalization; there is no transcribed record of this case. Mr. Lopez was not advised of his right to counsel. Mr. Lopez could not challenge any adverse evidence submitted. Taking into account these two factors balancing them against the fact that Congress has created an Immigration Court and that Immigration Judges routinely hear adjustment of status cases, this Court must conclude that Mr. Lopez possesses a due process right to be heard in an adversarial hearing.

CONCLUSION

This matter presents a significant issue concerning the petitioner's due process rights under the fifth amendment. Wherefore, for the reasons articulated above, Petitioner Juan Lopez. requests this Court grant this Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

Ivan Yacub
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Attorney for Petitioners
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Falls Church, VA 22042
(703) 533 2347

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
901 NORTH STUART ST., STE.1300
ARLINGTON, VA 22203

In the Matter of: Case No.: A99-378-387

LOPEZ, JUAN CARLOS

IN REMOVAL PROCEEDINGS RESPONDENT

ORDER OF THE IMMIGRATION JUDGE

Upon the basis of respondent's admissions, I have determined that the respondent is subject to removal on the charge(s) in the Notice to Appear.

Respondent has made no application for relief from removal.

It is HEREBY ORDERED that the respondent be removed from the United States to GUATEMALA on the charge(s) contained in the Notice to Appear.

Any alien against whom a final order of removal is outstanding by reason of being a member of any of the classes described in INA section 237(a), who willfully fails or refuses to present himself or herself for removal at the time and place required by the Attorney General shall be fined and/or imprisoned for up to ten years. Further, any alien who willfully fails or refuses to depart from the United States pursuant to a final

removal order or present for removal at the time and place required by the Attorney General shall pay a civil penalty of not more than $500 to the Commissioner for each day the alien is in violation of this section.

GARRY D. MALPHRUS

Immigration Judge Date: Aug 21, 2006

Appeal: (A/I/B)

Appeal Due By: Sep 20, 2006

CERTIFICATE OF SERVICE
THIS DOCUMENT WAS SERVED BY: MAIL (M)
PERSONAL SERVICE

TO: [X] ALIEN] [] ALIEN c/o Custodial Officer
Alien's ATT/REP [X] [ ] INS

DATE 8/21/2006 BY: COURT STAFF

8 / 2 1 / 2 0 0 6

Attachments: [EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other
Form EOIR 7 - 4T (REMOVAL Order)

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Arlington, Virginia

File No.: A 99 378 387

August 21, 2006

In the Matter of
JUAN CARLOS LOPEZ
IN REMOVAL PROCEEDINGS, Respondent

CHARGE:	Section 212(a)(6)(A)(i) of the INA for being present in the United States without being admitted or paroled;
ADDITIONAL CHARGE:	Section 212(a)(2)(A)(1)(I) of the INA for being an alien convicted of a crime involving moral turpitude or an attempt or conspiracy to commit such crime.

APPLICATIONS: None.

ON BEHALF OF RESPONDENT:
Ivan Yacub
307 E. Annadale Rd. Suite 201
Falls Church, VA 22042

ON BEHALF OF DHS:
Rook Moore
Asst. Chief Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a native and citizen of Guatemala, who was issued a Notice to Appear on June 22, 2006.

The respondent, through counsel, admitted the factual allegations in the NTA at an earlier Master Calendar hearing.

The respondent conceded at that hearing that he is removable under 212(a)(6)(A)(1) in that the respondent is present in the United States without being admitted or paroled. The Court finds that removability under this charge has been established by clear and convincing evidence.

The respondent denies that he is removable under Section 212(a)(2)(A)(1)(I) of the INA for having been convicted of a crime involving moral turpitude.

In this case, the respondent was convicted on May 22, 2006 for the offense of assault in violation of Virginia Code Section 18.2-7 and sentenced to 360 days incarceration. For this conviction, the respondent was originally charged with felonious assault, but the respondent was convicted of misdemeanor assault under 18.2-57. In addition, the respondent was convicted on June 21, 2006 for assault and battery in violation of Section 18.2-57, and sentenced to 30 days incarceration.

For this conviction, the respondent was originally charged with assault and battery against a family member. The charge was pled to assault and battery in violation of 18.2-57. The Government

agrees that these appear to be assault violations that did not have as a requirement of assault against a family member. Thus, the Government agrees that Matter of Tran would not apply. Therefore, these convictions are not crimes involving moral turpitude.

The Court agrees with the respondent's argument that these convictions are not CIMTs, because they appear to be pled down such that the actual conviction was not as an element of the crime a conviction against a family member. The Court can only look to the elements of the offense for which the respondent is convicted and simple assault would not rise to the level of a crime involving moral turpitude. As noted in Matter of Saduno, 23 I&N Dec. 968 (BIA 2006), simple assault without an aggravating factor does not involve moral turpitude.

In this case, the respondent was not convicted under 18.257.2 but, instead, was convicted under 18.2-57. In these circumstances, the Court concludes that there is not an aggravated factor of the family member involved in this conviction. Thus, accordingly, the Court concludes that the charge under Section 212 (a) (2) (A) (i) (I) cannot be sustained. Thus, the Court finds that the charge under 212(a)(2)(A)(i)(I) is not a charge for which the respondent is subject to removal.

However, as noted, the respondent is removable under 212(a)(6)(A)(i). Thus, the Court finds that removability has been established by clear and convincing evidence.

The respondent filed an application for legalization, pursuant to Section 245A of the INA. The respondent filed this application with USCIS and this application was denied.

The respondent makes various allegations regarding not receiving letters from USCIS in regards to this application. The Court is not making any factual findings on the respondent's self-serving allegations in this regard. This was a matter that was determined by USCIS.

The respondent seeks to renew his application with the Immigration Court. There is no regulatory authority for the respondent to renew the application with the Immigration Court. The Administrative Appeals Office within DHS has exclusive jurisdiction to review an alien's legalization claim. See 8 C.F.R. Section 245(a)(.2)(b). Therefore, this Court does not have jurisdiction to review the respondent's application for permanent residency.

The respondent argues that this is a Fifth Amendment due process violation. This Court is not authorized to determine a constitutional challenge to the regulations. Thus, it is not necessary for the Court to review in detail these constitutional allegations.

The respondent has no relief available to him, other than an attempt to renew his application for permanent residency, which this Court does not have jurisdiction to adjudicate. Accordingly, the respondent has no relief currently available to him.

The Court, having found the respondent removable under the initial charge, under 212(a)(6)(A)(1), and, finding that the respondent has no application for relief pending, that the Court concludes that the respondent is removable from the United States and will order the respondent removed to Guatemala on the charge contained in the Notice to Appear.

ORDER

IT IS THEREFORE ORDERED that the respondent shall be removed from the United States to Guatemala on the charges contained in the Notice to Appear.

Garry D Malphs

GARRY D. MALPHRUS Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE GARRY D. MALPHRUS, in the matter of:

JUAN CARLOS LOPEZ
A 99 378 387
Arlington, Virginia

is an accurate, verbatim transcript of the cassette tape as provided by the Executive Office for Immigration Review and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

Susan Aiello, Transcriber

Free State Reporting, Inc.
1378 Cape St. Claire Road Annapolis,
Maryland 21401 (301) 261-1902
October 22, 2006

(completion date)

By submission of this CERTIFICATE PAGE, the Contractor certifies that a Sony BEC/T-147, 4-channel transcriber or equivalent, as described in Section C, paragraph C.3.3.2 of the contract., was used to transcribe the Record of Proceeding shown in the above paragraph

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Security, OCC/WAS
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Suite 1307
Arlington, VA 22203

Name: LOPEZ, JUAN CARLOS

A99-378-387

Date of this notice: 12/11/2006

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,
/s/
Donna Carr
Chief Clerk

Enclosure

Panel Members:
PAULEY, ROGER

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals
Falls Church, Virginia 22041

File: A99-378-387 - Arlington Date: DEC 11, 2006

In re: LOPEZ, JUAN CARLOS

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Yacub, Ivan, Esquire

ON BEHALF OF DHS: Rook Moore, Assistant Chief Counsel

ORDER:

PER CURIAM. The respondent has appealed from the Immigration Judge's decision dated August 21, 2006. On appeal the respondent argues that his inability to have his legalization application reviewed by the Immigration Judge is a violation of his due process rights. However, the Department of Homeland Security has sole jurisdiction over the adjudication of legalization applications. See 8 C.F.R. §§ 245a.2; see also Matter of Singh, 21 I&N Dec. 427 (BIA 1996) (stating that the Board has no jurisdiction over legalization applications). As such, the Immigration Judge correctly found that he had no authority to allow the respondent to renew his

legalization application with the Immigration Court (I.J. at 4). With regard to the respondent's due process argument, we note that it is well-settled that this Board has no jurisdiction to adjudicate facial constitutional challenges to the Immigration and Nationality Act or its implementing regulations. Matter of C-, 20 I&N Dec. 529, 532 (BIA 1992). In sum, we find no merit to the respondent's arguments on appeal. Accordingly, the appeal is dismissed.

/s/
FOR THE BOARD

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-1020

JUAN CARLOS LOPEZ,

Petitioner,

versus

ALBERTO R. GONZALES,

Attorney General,
Respondent.

On Petition for Review of an Order of the Board of Immigration Appeals. (A99-378-387)

Submitted: August 31, 2007 Decided: September 13, 2007

Before WILKINSON, SHEDD, and DUNCAN, Circuit Judges.

Petition denied by unpublished per curiam opinion.

Ivan Yacub, LAW OFFICE OF IVAN YACUB, Falls Church, Virginia, for Petitioner.

Peter D. Keisler, Assistant Attorney General, Terri J. Scadron, Assistant Director, Greg D. Mack, Senior Litigation Counsel, Office of Immigration Litigation, UNITED STATES DEPARTMENT OF JUSTICE, Washington, p.c., for Respondent.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Juan Carlos Lopez, a native and citizen of Guatemala, petitions for review of a decision of the Board of Immigration Appeals ("Board") affirming the immigration judge's order of removal. On appeal, Lopez raises only one issue: that 8 C.F.R. § 245a.2(e) (2007), which provides that an application for legalization under 8 U.S.C.A. § 1255a (West 2005 & Supp. 2007) must be filed with the U.S. Citizenship and Immigration Service ("CIS"), with review to an Administrative Appeals Unit, rather than with an

immigration judge, deprives him of his constitutional rights of due process of law.

"The Attorney General enjoys broad powers with respect to `the administration and enforcement of [the Immigration and Nationality Act] and all other laws relating to the immigration and naturalization of aliens.'" Blanco de Belbruno v. Ashcroft, 362 F.3d 272, 279 (4th Cir.. 2004) (quoting 8 U.S.C. § 1103(a)(3) (2000)). Aliens have only those rights that Congress, and the Attorney General as guided by the applicable statutes, elect to provide them. Id. at 280. Here, the governing regulations place jurisdiction over legalization applications with the CIS, 8 C.F.R. § 245a.2(e), with a single level of appeal in the Administrative Appeals Unit. 8 C.F.R. § 245a.2(p). The Immigration Court and the Board have no jurisdiction to assess a legalization application or review its denial. Matter of Singh, 21

I. & N. Dec. 427, 433 (B.I.A. 1996). Lopez was provided with the proper procedures; therefore, he has received all the process he was due. See Orquera v. Ashcroft, 357 F.3d 413, 426 (4th Cir. 2003). ("To state a due process claim, the [alien] must first demonstrate that [he] ha[s] a protected interest and [he] ha[s] such an interest only as set out in [the Immigration Reform and Control Act of 1986] and [8 C.F.R.] § 245a.2[]").

Accordingly, we deny the petition for review. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

PETITION DENIED

FILED: July 2, 2008

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-1020
(A99-378-387)

JUAN CARLOS LOPEZ,
Petitioner

v.

ALBERTO R. GONZALES, Attorney General,
Respondent

ORDER

The Court denies the petition for rehearing and rehearing en banc. No poll was requested on the petition for rehearing en banc.

Entered at the direction of the panel:
Judge Wilkinson, Judge Shedd, and Judge Duncan.

For the Court

/s/ Patricia S. Connor, Clerk